

A **CHEN BOON KWEE v. BERJAYA SOMPO INSURANCE BHD**

COURT OF APPEAL, PUTRAJAYA
HAS ZANAH MEHAT JCA
ABU BAKAR JAIS JCA
HASHIM HAMZAH JCA

B [CIVIL APPEAL NO: J-02(NCvC)(A)-1518-08-2021]
30 AUGUST 2023

Abstract – *A party, having successfully obtained judgment in an action arising from a road accident, would still need to further initiate a recovery action against the insurance company as the insurer of the vehicle liable for the road accident claim, in order to be indemnified. This is more so where there are absent clauses in the insurance policy providing coverage for passengers. The recovery action would enable the correct construction and interpretation of the insurance policy and also allow the insurer the liberty to raise possible defence to the claims.*

INSURANCE: *Motor insurance – Liability – Insurer’s liability against passenger – Passenger obtained judgment for tortious claim for road accident – Whether insurer liable to indemnify winning party – Whether insurance policy provided coverage for passengers of vehicle – Whether owner of vehicle paid additional premium for coverage of passengers – Whether insurer party in liability action – Whether recovery action ought to be taken against insurer by passenger – Whether applicability of terms of policy remains to be seen in absence of recovery action*

F There was a road accident involving a car and a lorry. The car was owned by the second defendant, the wife of the appellant (‘first defendant’), and insured by the respondent (‘plaintiff’). The first defendant was a passenger in the car. The insurance policy did not provide coverage for passengers of the car and no additional premium was paid by the second defendant for coverage of the passengers of the car. Having sustained injuries for the accident, the first defendant sued the drivers/owners of the car and lorry for tortious claim. He claimed he was a passenger of the car for work commitments. Judgment was entered for him by the Sessions Court (‘SC’). The plaintiff in turn filed an originating summons (‘OS’) wherein the High Court allowed the prayers that: (i) the plaintiff was not liable to indemnify the second defendant until the first defendant had filed and obtained a judgment against the plaintiff *vide* a recovery action; and (ii) the judgment obtained by the first defendant against the second defendant in the SC be stayed. Hence, this appeal. The core issue for determination was whether a party who had obtained a judgment for a tortious claim in view of the road accident, must proceed to file and succeed in a recovery action against the insurer before the insurer could be made liable to indemnify the winning party for the first action for tortious claim.

Held (dismissing appeal; affirming decision of High Court)

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Per Abu Bakar Jais JCA delivering the judgment of the court:

- (1) It would not be sufficient for the first defendant to merely obtain judgment from the SC in respect of liability. The insurer relied on the clause in the insurance policy that it was not liable other than to the person who is rightly carried by reason of a contract of employment. The passage clearly stated, in that event, the insurer could resist the recovery suit by stating that the policy did not cover the claimant/passenger. The plaintiff's contention was not that the insurance policy was invalid or unenforceable, but instead was that the first defendant was not covered by the policy as the second defendant failed to purchase additional coverage for passengers like the first defendant. Hence, there was a need for the first defendant to file the recovery action before the plaintiff could be held liable. (paras 29 & 31-33)
- (2) In the action for liability brought by the first defendant, the plaintiff was not a party. The action for recovery was indeed needed for the first defendant to rightly bring the plaintiff to be liable as insurer of the vehicle. It will give the opportunity to the plaintiff as insurer to defend itself after not being a party in the action for liability. There was also a term of the policy that prohibits the claim of the first defendant as he was the husband of the second defendant and not under the latter's contract of employment and a mere passenger of the vehicle which was not covered by the policy. Whether the plaintiff could prove this term was applicable remains to be seen in the recovery action. (paras 36-38)

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Case(s) referred to:

AmGeneral Insurance Bhd v. Sa' Amran Atan & Ors And Other Appeals [2022] 8 CLJ 175 FC (*dist*)

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Letchumanan Gopal v. Pacific Orient & Co Sdn Bhd [2011] 5 CLJ 866 CA (*refd*)

Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors [2020] 10 CLJ 1 FC (*refd*)

Tenaga Nasional Bhd v. Chew Thai Kay & Anor [2022] 2 CLJ 333 FC (*refd*)

Union Insurance Malaysia Sdn Bhd v. Chan You Young [1999] 3 CLJ 517 CA (*refd*)

Yeap Tick In v. Pacific & Orient Insurance Co Bhd [2020] 4 CLJ 500 CA (*refd*)

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Legislation referred to:

Road Transport Act 1987, ss. 91, 96

For the appellant - Chong Zheng Hao & Aloysius Ng Inn Ee; M/s Murphy & Dunbar
For the respondent - Jeyaveeran S Naicker, Silva Velu, Imavathi Subramaniam & Kishan;
M/s Naicker & Assocs

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[Editor's note: *For the High Court judgment, please see Berjaya Sompoo Insurance Berhad v. Chen Boon Kwee & Anor* [2021] CLJU 1862; [2021] 1 LNS 1862 (*affirmed*).]

Reported by S Barathi

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JUDGMENT

Abu Bakar Jais JCA:

Introduction

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[1] This is an appeal against the decision of the learned Judicial Commissioner (“JC”), who gave judgment for the respondent at the High Court (“HC”). The appellant here was the first defendant and the respondent was the plaintiff at the HC. Hereinafter, the parties in this appeal would be referred to as they were in the HC.

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[2] The learned JC had allowed the plaintiff’s originating summons (“OS”) for the following prayers:

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- (i) the plaintiff is not liable to indemnify the second defendant until the first defendant has filed and obtained a judgment against the plaintiff *vide* a recovery action; and
- (ii) the judgment obtained by the first defendant against the second defendant in the Batu Pahat Sessions Court be stayed.

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[3] The first defendant is before us for the appeal against the decision of the learned JC. The plaintiff opposed the appeal and the second defendant at the HC is not a party in the present appeal.

Background Facts

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[4] There was a road accident involving a car and a lorry. The car was owned by the second defendant, who is the wife of the first defendant and insured by the plaintiff. The first defendant was a passenger in the car.

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[5] The insurance policy did not provide coverage for passengers of the car. No additional premium was paid by the second defendant for coverage of the passengers of the car.

[6] Having sustained injuries for the accident, the first defendant sued the drivers/owners of the car and lorry for tortious claim. He claimed he was a passenger of the car for work commitments. Judgment was entered for him by the Batu Pahat Sessions Court (“BPSC”).

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[7] The plaintiff in turn filed the OS and obtained the prayers at the HC as explained earlier after the first defendant obtained judgment from the BPSC.

At The HC

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[8] Based on the Court of Appeal case of *Union Insurance Malaysia Sdn Bhd v. Chan You Young* [1999] 3 CLJ 517; [1999] 1 MLJ 593, the learned JC decided that there is a need for the party who had obtained a judgment in a road accident case to further initiate a recovery action against the insurance

company as the insurer of the vehicle liable for the road accident claim. It is not sufficient for the party to obtain relief from the insurer merely by relying on the earlier judgment obtained for the tortious claim. This is because in the above case, *Union Insurance*, there was indeed a second action or recovery action filed against the insurance company after the plaintiff in that case had obtained the judgment against the insured.

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[9] In order to support the decision of the HC, the learned JC also relied on another Court of Appeal case in *Letchumanan Gopal v. Pacific Orient & Co Sdn Bhd* [2011] 5 CLJ 866, where the judgment indicates that a separate recovery action would have to be undertaken against the insurance company as the insurer after the judgment on the tortious claim for the road accident had been obtained.

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[10] The learned JC also drew support for his decision by yet another Court of Appeal case, *Yeap Tick In v. Pacific & Orient Insurance Co Bhd* [2020] 4 CLJ 500; [2020] 3 MLJ 449 that according to the learned JC, provided exception as to when a recovery action must also be filed against the insurance company as insurer.

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[11] The learned JC found that the need for a recovery action against the insurer is because the insurer is at liberty to rely and argue on the exception clause of the insurance policy that states no insurance is to be provided for death or injuries to anyone 'other than a person carried by reason of or in pursuant of the contract of employment'.

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[12] The first action is to determine liability and damages for the tortious claim arising from the road accident. While the second action for recovery against the insurance company as insurer is to determine the construction and interpretation of the insurance policy and the application of ss. 91 and 96 of the Road Transport Act 1987.

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[13] Therefore, the learned JC decided that before the first defendant could benefit from the judgment obtained from the BPSC, the first defendant must file and pursue a second action in the form of a recovery action against the plaintiff. Consequently, the judgment obtained from BPSC is stayed pending the disposal of this recovery action.

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Summary Of The Plaintiff's Submission

[14] What was sought by the plaintiff at the HC is merely a determination of liability towards the first defendant under the terms of the policy of insurance and whether there is a breach by the owner/driver of the car.

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[15] The recent decision of the Federal Court in *AmGeneral Insurance Bhd v. Sa' Amran Atan & Ors And Other Appeals* [2022] 8 CLJ 175 is distinguishable. This Federal Court case dealt with third parties but in the present appeal, the first defendant was a passenger in the car and not a third

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A party by operation of law. The decision of the HC was correctly given as it is consonant with established law. This court should uphold the HC's decision.

[16] This court, as an appellate court, can only disturb the decision of the HC if the latter's decision is wrong in law and fact. The factual finding of the HC can only be set aside if it is plainly wrong.

B [17] Previously, the judgment obtained by a party in an accident claim requires a further recovery action to be taken against the insurer. Only when the recovery action is decided for the party obtaining the judgment, can it be enforced against the insurer.

C [18] The insurance policy prohibits the claim of the first defendant as he is the husband of the second defendant (a member of the household) and not under the latter's contract of employment and a mere passenger of the vehicle, which was not covered by the policy.

D **Summary Of The First Defendant's Submission**

[19] The Federal Court case of *AmGeneral Insurance Bhd (supra)* is argued as the authority that no recovery action needs to be filed after the judgment for the liability action had been obtained.

E [20] The exception that *Yeap Tick In* allowed to determine that a recovery action is still needed when the insurer is not relying on the defence that the insurance is invalid or unenforceable, is wrongly decided. This is because even when the insurer relies on the defence that the insurance does not cover the claimant, this is still a matter where the insurer can still ask for a declaration without a need for a recovery action.

F [21] The insurer should take an active part and resist the claim after knowing the liability action had been filed by the claimant against the insured. If this is done by the insurer, it would mean there is no further need to file a recovery action against the insurer.

G [22] The plaintiff could still recover from the insured, in this case, the second defendant, if it had honoured the liability action obtained by the first defendant.

Our Decision

H *Whether There Is A Need For The First Defendant To Initiate Recovery Action Against The Plaintiff After Obtaining Judgment At BPSC*

I [23] The core issue in this case is whether a party who had obtained a judgment for a tortious claim in view of the road accident, must proceed to file and succeed in a recovery action against the insurer before the insurer could be made liable to indemnify the winning party for the first action for tortious claim.

[24] In this regard, all three cases, *Union Insurance*, *Letchumanan Gopal* and *Yeap Tick In*, referred by the learned JC and highlighted earlier, are indeed indicative that the recovery action needs to be filed against the insurer subsequent to the judgment for tortious claim being obtained.

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[25] In *Union Insurance*, there were indeed two separate suits. First, for the claim arising from the road accident and second, where the insurance company was sued to determine whether it should pay damages after the judgment was obtained for the first suit. The Court of Appeal decided that the second suit was proper and it held as follows:

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The respondent was entitled to recover from the insurance company as she was travelling in the car belonging to her husband, who was the insured, and driven by her son, who was the authorised driver, under the relevant policy by reason of or in pursuance of a contract of employment not with the insured.

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[26] This case supported the decision of the learned JC that the recovery action ought to be filed before the plaintiff could be liable to indemnify the first defendant in respect of the first action where judgment was already obtained by the first defendant.

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[27] We are also of the considered view that the second case of the Court of Appeal, *Letchumanan Gopal*, relied on by the learned JC in coming to the decision of the HC, is also supportive of the HC's finding that a recovery action needs to be filed before the plaintiff could be liable. Abdull Hamid Embong (JCA), in delivering judgment held as follows:

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[20] It is our view that the liability and recovery actions are distinct from each other. The former is a claim founded on tort whereas the latter is based on a statutory right provided under the provisions of the RTA. For this reason alone it would be unjust to bar the insurers from raising afresh the issue of its liability even to the extent of adducing evidence on the same issue at the recovery action stage.

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[21] In the liability action, the issue before the court would be to determine negligence whereas in the recovery action the issues include the construction of the terms in the insurance policy and the application of s. 91 and s. 96 of the RTA. It is upon this construction of the insurance policy that the insurers raised for the first time in the recovery action. In this appeal, P & O, as the insurers is thus seeking to declare that the policy as against the deceased, is unenforceable due to the exception in its terms. This issue remains alive and was brought up on appeal to the High Court and now before us.

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[28] It was also correct for the learned JC to note the supporting judgment of Abdul Malik Ishak (JCA) in the above case where it is said:

[32] Now, since the appellant was a mere passenger in the motor lorry no: WT 1835 and not working for Kumpulan Jagoh Angkut Sdn Bhd, the High Court was right in holding that P&O cannot be held liable in the recovery action filed by the appellant. There was no contract of service between the appellant and Kumpulan Jagoh Angkut Sdn Bhd.

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A [29] The relevant passages quoted in the case above, illustrate the point that it would not be sufficient for the first defendant to merely obtain judgment from the BPSC in respect of liability. There is still a need to initiate a recovery action against the plaintiff as the insurer.

B [30] In respect of the Court of Appeal case of *Yeap Tick In*, the learned JC accepted that the case had ruled that there is no necessity to file a further action for recovery once the judgment on liability is obtained. Nonetheless, the learned JC rightly quoted the judgment of Harmindar Singh JCA (now FCJ) in that case, which states as follows:

C [25] Similarly in the case of *Letchumanan a/l Gopal (representative for the estate of Rajammah a/p Muthusamy, deceased) v. Pacific Orient & Co Sdn Bhd* [2011] 5 CLJ 866; [2011] 6 MLJ 788 which case was heavily relied upon by the respondent. *The insurer there was not contending that the policy was invalid or unenforceable. The insurer relied on an exception of the liability clause in its insurance policy that stated that the insurer would not be liable for the death of or bodily injury to any person 'other than a passenger carried by reason of or in pursuance of a contract of employment'. In such a case, the insurer can resist the recovery suit by stating in its defence that the terms of the policy did not cover the passenger.*

(emphasis added)

E [31] Thus, we are of the view that the learned JC was not in error to refer to the above passage. This is when the insurer relied on the clause in the insurance policy that it is not liable other than to the person who is rightly carried by reason of a contract of employment. The passage clearly states in that event the insurer can resist the recovery suit by stating that the policy did not cover the claimant/passenger. That passage indicates the need for a recovery suit and not just the liability suit.

F [32] In the present case too before us, the learned JC correctly found that the plaintiff did not contend that the insurance policy was invalid or unenforceable. What the plaintiff contended was that the first defendant is not covered by the policy as the second defendant failed to purchase additional coverage for passengers like the first defendant.

G [33] Thus, it is clear to us that the learned JC had correctly referred to all the case law authorities above to find there is a need for the first defendant to file the recovery action before the plaintiff could be held liable.

H *Whether We Are Bound To Follow The Three Decisions Of The Court Of Appeal Above*

I [34] *Union Insurance, Letchumanan Gopal* and *Yeap Tick In* are all cases of the Court of Appeal. Are we bound to follow the above cases? Perhaps many would find the relatively recent decision of the apex court on this point illuminating. In the Federal Court case of *Tenaga Nasional Bhd v. Chew Thai Kay & Anor* [2022] 2 CLJ 333, Azahar Mohamed CJM said as follows:

[22] These conflicting decisions of the two Court of Appeals in *Mayaria CA (supra)* and *Karun Klasik (supra)* were later resolved by this court when the two cases were heard together on appeal. As we have indicated earlier, on 4 September 2019 this court upheld the decision of the Court of Appeal in *Mayaria CA (supra)* and reversed the Court of Appeal's decision in *Karun Klasik (supra)*. Unfortunately, the Federal Court has not provided the written grounds for these decisions. *We would observe at this juncture, that it was not open to the Court of Appeal in Karun Klasik (supra) to depart from its earlier decision in Mayaria CA (supra), which was decided earlier as the rule of legal precedence must be followed in the interest of certainty (see Young v. Bristol Aeroplane [1944] KB 718, PM Hendry v. George John De Cruz [1948] CLJU 39; [1949] Supp MLJ 25, Davis v. Johnson [1978] 1 All ER 1132 and Kejuruteraan Bintai Kindenko Sdn Bhd v. Fong Soon Leong [2021] 5 CLJ 1; CA ("Kejuruteraan Bintai Kindenko").* We will say more about the importance of obedience of judicial precedence in the later part of our judgment.

[34] While still on the subject of the importance of obedience of judicial precedence, the point is aptly put by Darryl Goon Siew Chye JCA, to which we respectfully agree, in delivering the latest judgment of the Court of Appeal on this subject matter in the case of *Kejuruteraan Bintai Kindenko (supra)* as follows at para. 72:

[72] ... While judges may no doubt sincerely have differences in views, there is also public interest to consider. It would be a lamentable state of the law if members of the public, in whatever sector, are unable to secure legal advice of sufficient certainty in order to properly conduct or regulate their affairs because of a confusing melee of conflicting legal decisions by the courts.
(emphasis added)

[35] Some might like to argue that this is not the *ratio decidendi* of the apex court above and therefore need not be followed. However, we are of the view, *ratio* or not, the above is clearly stated by the apex court, no less by a highly respected member of the Federal Court delivering the decision. Hence, it is patently clear to us, not only we ought to respect and recognise that the statement above by the apex court but also to give effect to the same by following the decisions of *Union Insurance, Letchumanan Gopal* and *Yeap Tick In*. After all, in doing so, we are merely complying with what is clearly required and exhorted by the Federal Court, as seen in the passage above.

Whether There Is A Need For Recovery Action In View Of The Terms Of The Insurance Policy

[36] In the action for liability brought by the first defendant, the plaintiff was not a party. It was only between the first defendant and the driver of the vehicle and the second defendant in order to determine liability.

[37] We are of the view, the action for recovery is indeed needed for the first defendant to rightly bring the plaintiff to be liable as insurer of the vehicle. This is because it will give the opportunity to the plaintiff as an

- A insurer to defend itself after not being a party in the action for liability. In the recovery action, the plaintiff can then bring the defence that the insurance policy does not cover the first defendant. This is because there is a term of the policy, that prohibits the claim of the first defendant as he is the husband of the second defendant (a member of the household) and not under the latter's contract of employment and a mere passenger of the vehicle which
- B was not covered by the policy. This term is as follows:

- We will not pay for liability to any person who is a member of Your and/or Your authorized driver's household who is a passenger in Your Vehicle unless he/she is required to be carried in or on Your Vehicle by reason of or in pursuance of his/her contract of employment with You and/or Your authorized driver and/or his/her employer.
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- Your household refers to all members of your immediate family (ie, Spouse, Children including legally adopted Children, Parents, Brother and Sister).
- D [38] Whether the plaintiff could prove this term is applicable remains to be seen in the recovery action. That is why there is the need for the recovery action to be filed by the first defendant against the plaintiff as an insurer.

Whether AmGeneral Insurance Bhd Should Apply In This Case

- E [39] We are of the view that *AmGeneral Insurance Bhd* would not have the effect of barring the possible defence by the plaintiff that the insurance is not applicable for the first defendant having regard to the term of the policy as referred to earlier in these grounds of judgment (please see para. 37 above).

- F [40] This would mean that the plaintiff should not be estopped from raising this defence when the recovery action is filed, especially when the plaintiff is not a party in the liability action taken by the first defendant.

Conclusion

- G [41] It could not be denied that the learned JC had referred to the Court of Appeal cases of *Union Insurance*, *Letchumanan Gopal* and *Yeap Tick In* in correctly deciding there is still a need for the first defendant to take recovery action against the plaintiff after obtaining judgment for the action on liability. These cases support that finding made by the learned JC.

- H [42] In this regard, we are guided by the Federal Court case of *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1, where it held as follows:

- As long as the trial judge's conclusion can be supported on a rational basis in view of the material evidence, the fact that the appellate court feels like it might have decided differently is irrelevant. In other words, a finding of fact that would not be repugnant to common sense ought not to be disturbed. **The trial judge should be accorded a margin of appreciation when his treatment of the evidence is examined by the appellate courts.**
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(emphasis added)

[43] The plaintiff should also have the liberty to raise possible defence to the claim by the first defendant in the recovery action that ought to be filed after the latter obtained the judgment for the liability action. Denying the need for the recovery action to be filed would unfairly prohibit and frustrate completely the plaintiff from raising the possible defence.

[44] Based on all the reasons explained, we are unanimous that the decision of the HC be affirmed and the appeal be disallowed.

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